PUBLIC PROSECUTOR

v.

JOHARI ABDUL KADIR

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CRIMINAL TRIAL NO. 29 OF 1984]
18 NOVEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Arrest - Bodily search of suspect under arrest - Admissibility of statement - Judicial discretion to call additional witness - Criminal Procedure Code - Sections 15, 20, 113, 425.*

The accused was charged with trafficking in dangerous drugs in contravention of s. 39B(1)(a) of the Dangerous Drugs Acts 1952 ("the Act"). The prosecution sought to adduce evidence that the accused had in his possession the dangerous drugs concealed in a black bag and that he had the necessary knowledge of the said drugs. The prosecution also attempted to adduce evidence contained in a certain statement which was made by the accused to Inspector Othman bin Senik, in which the statement indicated that the black bag containing the dangerous drugs belonged to the accused. The learned Judge questioned the admissibility of the answer given by the accused because in eliciting this answer, the accused was already under arrest and Inspector Othman bin Senik had failed to administer the necessary caution under proviso (b) of s. 37A(1) of the Act.

The prosecution also made an application under s. 425 of the Criminal Procedure Code ("the CPC"), to call Omar bin Jusoh as an additional witness so as to rebut a statement made by the accused from the dock.

Held:

[1] At the time when the accused unlocked the bag, he was already under arrest because by that time the liberty of the accused to move freely had been curtailed and that PW1 (Inspector Othman bin Senik) by his conduct clearly showed that he would if necessary use force to restrain the accused from moving freely. In the circumstances therefore, the accused was under arrest before the question was put to him by PW1 and no caution was administered to him to elicit the answer. Therefore the statement said to be made by the accused in answer to the question by PW1 is not admissible.

[2] Under s. 425 of the CPC, discretion lies with the Court whether to call any additional witness or to recall and re-examine any person already examined and the main consideration has to be the essentiality of the additional evidence to a just decision of the case. The application was disallowed because whatever evidence that could be given by Omar could not be of much assistance to the Court in arriving at a just decision.

[Accused acquitted and discharged.]

[Editor's Note: The accused first appeared before the Alor Setar Sessions Court in which he claimed trial and when the case came up for mention again a requisition order of the Public Prosecutor was tendered to the Court requesting the case to be transferred to the High Court, Alor Setar. Counsel for the defence objected on grounds that the accused had an accrued right under the law to be tried by the Sessions Court. The objection was overruled based on the authority of *PP v. Cheah Cheng Eng.*]

Cases referred to:
PP v. Cheah Cheng Eng [1986] CLJ (Rep) 212
Haw Tua Tau v. PP [1981] CLJ (Rep) 11
Ragunathan v. Pendakwa Raya [1982] 1 MLJ 139
Rex v. Carr-Briant [1943] 1 KB 607
PP v. Yuvaraj [1969] 2 MLJ 89
PP v. Datuk Tan Cheng Swee [1980] 2 MLJ 276
PP v. Er Ah Kiat [1966] 1 MLJ 9
Wong Thin v. PP [1958] 24 MLJ 29
Goh Khiok Phiong v. Regina [1945] MLJ 223
Broadhurst v. The Queen [1964] AC 441
Pavone v. PP [1984] 1 MLJ 77
PP v. Ang Boon Foo [1981] 1 MLJ 40
PP v. Tan Seow Chuan [1985] 1 MLJ 318
Abdullah Zawawi v. PP [1985] CLJ (Rep) 19
Tua Kin Ling v. PP [1970] 2 MLJ 61
Khoon Chye Hin v. PP [1961] 1 MLJ 105
DPP v. Brooks [1974] AC 862
Ramli bin Kechik v. PP [1986] CLJ (Rep) 243
Jamatraj v. State of Maharashtra [1968] AIR SC 178
Shaaban & Ors. v. Chong Fook Kam & Ors. [1969] 2 MLJ 219

Legislation referred to:
Criminal Procedure Code, s. 425
Dangerous Drugs Act 1952 (Revised 1980), ss. 2, 37A(1)(b), 37(d), (da), 39B(2), (1)(a)
Evidence Act 1950 (Act 56), s. 114illus.(g)

For the public prosecutor - Mohamed Bazain bin Idris, DPP
For the accused - Manjit Singh; M/s. Manjit Singh & Co.

JUDGMENT

Lim Beng Choon J:

The charge against the accused was that on 23 September 1982 at about 11.30 p.m. at Sungei Patani police station compound, Kedah, he did on his own behalf traffic in dangerous drug, to wit 2,124.3 grammes of cannabis in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and that he had thereby committed an offence punishable under s. 39B(2) of the said Act.

At the onset of the trial the learned defence Counsel raised a preliminary objection on a point of law. He contended, if I understand him correctly, that this Court had no jurisdiction to hear this case since 21 June 1983 when the accused appeared before the Alor Setar Sessions Court the charge was read and explained to him and he claimed trial whereupon the learned President fixed 21 to 24 January 1985 for the hearing of the case. In the result so said the learned defence Counsel, the accused had an accrued right under the law to be tried by that Court and the requisition order of the Public Prosecutor tendered to that Court when the case came up for mention again on 24 June 1984 requesting that the case be transferred to this Court for trial was of no effect and the learned President was wrong to transfer this case to this Court pursuant to the requisition order. I overruled the objection on the authority of *PP v. Cheah Cheng Eng* [1986] CLJ (Rep) 212 where the Supreme Court gave a ruling on this issue which of course is binding on me.

The evidence of the prosecution was that on 23 September 1982, one Inspector Othman bin Senik, PW1, who was then attached to the Sungei Patani Police Station ("the police station")

received information regarding a dangerous drug trafficking operation that was due to take place that evening. Acting on the information, PW1 together with nine other police officers stopped a bus registration number KN 6985, P8 ("the bus") operated by Kota Express Sdn. Bhd. which according to its schedule was making its run from Alor Setar to Kuala Lumpur. The bus was stopped by PW1 in front of the police station at about 10.30 p.m. PW1 together with three other police officers boarded the bus to check the identity cards of the passengers starting with those sitting in the front part of the bus. On checking the identity card of one of the passengers and upon discovering that his name was Omar bin Jusoh, PW1 immediately took him into custody and ordered him to get down from the bus. PW1 did the same to another passenger whose name was found to be Omar bin Isa. When PW1 reached seat No. 36 which was at the extreme end of the bus and which was occupied by the accused, PW1 also detained him when he found out from the identity card of the accused that his name was Johari bin Abdul Kadir and he was ordered by PW1 to get down from the bus under the guard of a police officer PW1. After alighting from the bus, PW1 then ordered the bus driver, Othman bin Ahmad PW2, to reverse the bus and park it at the police compound behind the police station. The accused was then brought by PW1 and the police who was then guarding him to the said police compound. Omar bin Jusoh was also kept under police custody at the said compound together with the accused. The luggage compartment of the bus ("the luggage compartment") was unlatched and the passengers were told to collect their own luggages. PW1 admitted in his evidence in cross-examination that there was no proper supervision regarding the collecting of luggages by the passengers to ensure that each passenger took away only his or her own luggage. Some passengers were seen at the material time to be carrying away more than one piece of luggage. While the passengers were retrieving their luggages, Omar bin Jusoh and the accused were still under guard by the police at the police compound. When Omar bin Jusoh was about to be taken into the police station he was allowed to recover his luggage but no evidence was adduced to show that the accused was also given any opportunity to collect his luggage. After the passengers had collected their luggages, one black bag, P2 was still found lying in the luggage compartment. Despite inquiries made by PW1 no one came forward to claim P2 and it was then taken into the narcotics room in the police station ("the narcotics room"). According to PW1 the accused was taken into the narcotics room at the same time and a bodily search was carried out on him by PW1 in the presence of two other police officers, the bus driver, PW2, and Inspector Hassan bin Othman who was the investigating officer, PW3. As a result of the search a brown purse, P3 was recovered from the accused and in it there were a cloth talisman, a Kota express bus ticket, P7, and a small key, P4. PW1 thereupon directed the accused to unlock the built-in lock of P2 using P4. The accused was said to be shivering slightly but he succeeded in unlocking P2 with the key, P4. PW1 then opened up P2 and he found a white bluish towel placed lengthwise across the top of the bag. PW1 then questioned the accused as to who was the owner of P2. The accused gave an answer to the question but I queried the learned DPP as to the admissibility of the answer given by the accused since in eliciting the answer the accused was already under arrest and PW1 had failed to administer the necessary caution under the proviso (b) of s. 37A(1) of the Dangerous Drugs Act 1952 (Revised 1980). The learned DPP contended that the accused was not at the material time under actual arrest although he might be under "constructive" arrest. Furthermore, so said the learned DPP, since the Defence Counsel had not raised any objection, the question of non-admissibility of the answer as evidence should not arise. I rejected the contentions of the learned DPP and held that the answer was inadmissible. The reason for my decision had been noted in the relevant part of the notes of evidence which I now reproduce in appendix I to this judgment.

Reverting to the evidence of the prosecution, it was shown that upon removal of the towel, PW1 found 64 plastic packets, P6(1) to P6(64), containing 3,203 rolled-up sticks which contained something which PW1 suspected to be cannabis. PW1 then handed the exhibits to PW3, the investigating officer who also put the accused in the police lockup. PW3 then sent the exhibits to the chemist for the analysis and it was confirmed by the chemist that the 3,203 rolled-up sticks contained 2,124.3 grammes of cannabis. The chemist report was served on the accused and was also tendered as Exhibit P12 at the trial.

In deciding whether the prosecution had made out a case against the accused which if unrebutted would warrant his conviction, I reminded myself of the principle as enunciated in the judgment of Lord Diplock in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11. My understanding of the principle from my reading of the relevant passages of the judgment appearing at pp. 51 and 52 is that at the conclusion of the prosecution case what has to be decided by the Judge of the trial involved only a question of law and, as a decider of law, the Judge is required to consider whether there is some evidence which is not inherently incredible to substantiate each and every essential element of the offence with which is not inherently incredible to substantiate each and every essential element of the offence with which the accused is charged. The principle of "some evidence which is not inherently incredible" to substantiate the essential elements of the offence was adopted and explained by the Federal Court in *Ragunathan v. Pendakwa Raya* [1982] 1 MLJ 139 at p. 141 where it is stated:

> Applying that principle, the learned Magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or **enable its existence to be reasonably inferred.** [Emphasis supplied]

Bearing in mind the aforesaid principle as set out in the two authorities cited above, I proceeded to examine the prosecution evidence to see whether the prosecution had adduced some evidence to substantiate the essential elements of the offence with which the accused was charged. From the prosecution evidence I was satisfied that it was not inherently incredible to attribute to the accused the custody or control over the black bag, P2, by him since he was found to be in possession of the key, P4, which could unlock the built-in-lock of P2 in which the dangerous drugs in question were found to be concealed. The key, P4, so to speak, was the key to the power of custody or control over the said bag. The prosecution had therefore adduced some evidence from which an inference could be drawn that the accused had control over P2. The logical consequence of my finding was that the prosecution had succeeded in invoking the presumption under s. 37(d) of the Dangerous Drugs Act 1952 (Revised 1980). As the quantity of the dangerous drugs in question exceeded the limit specified in s. 37(da) of the said Act it must be presumed, until the contrary is proved, that the accused was at the time and place mentioned in the charge, trafficking in the said dangerous drugs.

In his submission that the prosecution had failed to make out a *prima facie* case which required the calling of the accused to enter upon his defence, the learned defence Counsel contended firstly, if I understand him correctly, that since the accused was under police detention from 10.30 p.m. to about midnight, he could not be said to have committed the offence of trafficking at 11.30 p.m. as mentioned in the charge. I rejected this contention on the ground that since the word "trafficking" as defined in s. 2 of the Dangerous Drugs Act 1952 (Revised 1980) includes *inter alia* "transporting" and "sending" and since the presumption provided in s. 37(d) of the said Act had been invoked it must be presumed that, until the contrary is proved, the accused had in his possession and the necessary

knowledge of the dangerous drugs in question concealed in P2, and he was transporting or sending them from the time he left his house and boarded the bus at the bus terminus at Alor Setar to begin his journey until he arrived at the Sungei Patani police station. Is it not therefore correct to state that in the circumstances he had committed the offence of trafficking in the dangerous drugs in question, although the commission of the offence was not discovered until the police carried out investigations at the said police station? The answer to this question must be in the affirmative bearing in mind that a commission of an offence could and often did take place before it is found by the police as a consequence of their investigations. Besides, in the present case it is difficult if not impossible for the police to know the precise time when the accused left his house with P2. In any event it is judicially acknowledged that an error in the date and time stated in a charge is not material unless they are actually an essential part of the alleged offence. In the present case even if the time stated in the charge is erroneous, which I do not think so, it cannot be said to have misled the accused. Neither can it be said to have caused any injustice to him.

The second part of the learned defence Counsel's submission, consisted in the main an attack on the accuracy, veracity and credit-worthiness of the evidence of the prosecution witnesses. Following the principle laid down in the *Haw Tua Tau* case (*supra*) and the *Ragunathan* case (*supra*), I, as a decider of law, at the close of prosecution case, should not embark on an enquiry on such matters as they involved questions of fact which should be determined only upon the close of the case for the defence and upon hearing the submissions of Counsel. I therefore called upon the accused to enter on his defence.

The three courses available to the accused were explained to him, and he chose to give a statement from the dock. In his statement he asserted that he was invited by Omar bin Jusoh, who was the same Omar bin Jusoh who was detained together with him at the Sungei Patani police station, to go to Kuala Lumpur. As the accused was unemployed and also wished to visit his mother in Pahang he accepted the invitation. On the day of the journey that is on 23 September 1982, he was given a red bag by Omar bin Jusoh in which he put his clothings and other personal belongings. He was also given a key of the red bag. On arrival at the bus terminus he left the red bag with the said Omar while he went out to have his dinner. On his return he found that his red bag had been taken aboard the bus and the bus was about to depart. He then boarded the bus to commence his journey to Kuala Lumpur. On arrival at the police station, the police stopped the bus and some police officers boarded the bus to check the identity cards of the passengers. When the bus was moved to the rear compound of the police station, a police officer carried out a bodily search on him while he was still on the bus, but nothing was found. He was then brought out into the police station where another bodily search was made on him with the same result. After detaining him for two hours the police then brought him to the narcotics room. There were many people in the room and he also saw P2 on a table in the said room. When he went into the room, P2 was already opened and he also saw his red bag placed on the same table. A police officer then asked him for the key of the red bag which he willingly handed over to him. He was then placed under arrest and put in the lockup.

The only witness called by the defence was one, Yow Fook Chan, DW1, who said that he was the supervisor of the Kedah Shopping Centre, Alor Setar. In his evidence he said that on the day before he came to this Court to testify, the Defence Counsel bought three bags from his shop. He identified the three bags which were an "18" black bag, D14; and 18" brown bag, D15; and a 16" brown bag, D16. A receipt in respect of the purchase was produced and tendered as the defence Exhibit, D13. Each of the bags had a built-in lock similar to the one in P2. DW1 demonstrated to this Court that by using any one of the keys

of D14, D15, and D16, he could unlock every other one of the bags, D14 to D16. Likewise by using the key, P4, of the offending bag, P2, it could lock and unlock D14, D15, and D16. He went on to say that P4 was a "standard" key.

Before I proceed to evaluate the evidence in the present case, it is necessary for me to examine the law governing the evidentiary burden imposed on the accused to rebut the prosecution case when, as in the present case, it rests wholly on the presumption under s. 37(d) of the Dangerous Drugs Act 1952 (Revised 1980) which reads as follows:

> 37. (d) Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug, shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

In consideration of the standard of proof imposed on the accused the words "unless the contrary is proved" are very crucial. A review of the authorities preponderantly manifests that where by statute some matter is presumed against an accused person "unless the contrary is proved" the standards of proof required to rebut the presumption is no more than that required of a party in a civil action. This principle is well-illustrated in *Rex v. Carr-Briant* [1943] 1 KB 607 where in determining the standard of proof required of an accused to rebut a statutory presumption the English Court of Criminal Appeals said at p. 612:

> In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved," the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

A guideline on what might be constituted as a preponderance of probabilities that would enable a tribunal to return a verdict in favour of an accused person is neatly set out in the following passage of the judgment in that case:

> Where the matter is so far gone that the parties are at issue ... so that the jury is to give a verdict one way or other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probably and by the same reason that which is most probable shall be good evidence.

The principle regarding the preponderance of probabilities as enunciated in the *Carr-Briant* case is further explained by the following passage of the judgment in *PP v. Yuvaraj* [1969] 2 MLJ 89 at p. 92:

> In their Lordships' opinion the general rule applies in such a case and it is sufficient if the Court considers that upon the evidence before **it is more likely** than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities. (Emphasis supplied)

On the other hand as to the burden of proof required of the prosecution it is true that the prosecution do not have to prove beyond a shadow of doubt the accused's guilt; the burden which rests on the prosecution is only to prove beyond a reasonable doubt every essential element of the offence with which the accused was charged. However that may be, it is clear that if the Court should find on the **totality** of the evidence at the end of and on the close of the whole case that there is a reasonable doubt from the evidence as adduced **either** by the prosecution or the accused as to the guilt of the accused the prosecution must be held to have failed to discharge their burden of proof and the accused is entitled to an acquittal. This proposition is encapsulated in the following passage of the judgment in the *Yuvaraj* case (*supra*):

> In criminal proceedings on the other hand, by an exception to the general rule founded upon considerations of public policy, if the consequence of a finding that a particular fact is proved will be the conviction of the defendant the degree of probability must be so high as to exclude the reasonable doubt that fact exists.

A similar approach on the standard of proof required of an accused is clearly manifested by our Federal Court in *PP v. Datuk Tan Cheng Swee* [1980] 2 MLJ 276 where it is stated at p. 278:

> With respect, the learned Judge was right but he did not need the *dictum* referred to for such a fundamental proposition in our system of adversary trials that when the prosecution had raised a *prima facie* case against the accused, it was at all times open to the accused to rebut the prosecution case, on a balance of probabilities, or to cast a doubt on it. This basic principle must also apply where it was a question of a guilty mind. If the *dictum* merely expresses a fundamental principle, then clearly more should not be read into the Federal Court judgment than what was written therein. There was never any open invitation to the trial Court to acquit whatever the evidence. On the other hand, it was also not a direction to convict. All that it said and meant was that trial Court should reasonably, properly and judicially consider the defence in the light of the prosecution case and come, on the **totality** of the evidence before it, to a correct decision, without fear or favour, in the proper exercise of its judicial function. [Emphasis is mine]

Another important point which has to be considered incidentally relating to the standard of proof required of the accused concerns the election of the accused to make an unsworn statement from the dock. It is well-settled that an accused has a right to make such a statement instead of electing to be a witness on his own behalf and that the right is a substantive right. It is equally well-settled that an accused is entitled to have his statement considered for all it is worth along with all the other evidence. Needless to say that a statement from the dock carries on the face of it certain infirmities - it has not the sanction of an oath and it is not tested by cross-examination. However that may be, I believe I am correct in saying that it cannot be said that such a statement has no evidentiary value at all. It is obvious that every such statement is of necessity an endeavour to gain credence for the assertions put forward by the accused in his statement whether in opposition to the case for the prosecution or in contradiction of the sworn statements of the prosecution witnesses or by way of explanation so as to either strengthen the case for the defence, if the assertions are believed, or to cast doubt in the prosecution case even if the Court is not convinced of the truth of the statement. It is within this context that I say that the statement of the accused made from the dock has some evidentiary value. I find support of this concept from the following passage in the judgment of *PP v. Er Ah Kia*t [1966] 1 MLJ 9 where it is stated at p. 11:

> The accused elected to make a statement from the dock. I have to consider his defence which may be one of three results: it may convince me of his innocence, or it may cause me to doubt the truth of the prosecution case, in which case the accused is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution.

Reference may also be made to *Wong Thin v. PP* [1958] 24 MLJ 29 in support of this concept.

In further elaboration of the evidentiary value of a statement from the dock, I take note that it is incumbent on a trial Judge to evaluate the **totality** of the evidence adduced by all parties at the end of and on the close of the whole case in order to arrive at a proper and correct decision - see *Datuk Tan Cheng Swee* case (*supra*). By virtue of this elementary but fundamental proposition the accused can therefore at the end of and on the close of the

whole case rely solely on the infirmities in the prosecution case to establish his innocence. On the other hand the prosecution is not permitted to take advantage of the weakness of the defence to supplement or to use it as to a complement to prop up their case. The consequence of this fundamental proposition is that at the end of the day and upon the ultimate analysis, the Court is satisfied that the prosecution have not discharged their burden of proof, then the verdict must inevitably be an acquittal of the accused regardless of the weakness of the defence put up by the accused. Thus in *Goh Khiok Phiong v. Regina* [1954] MLJ 223 Smith J said at p. 226:

> The weakness of the defence, however, does not necessarily compensate for inadequacies in the prosecution case.

This fundamental proposition is tersely put in a single sentence appearing in the judgment of the Privy Council in *Broadhurst v. The Queen* [1964] AC 441 at p. 451:

> They (the prosecution) are not entitled to have the prisoner's assistance in proving their case; even if his memory had been perfect, he is under no obligation to give evidence. [Words within parenthesis are mine]

It is also useful to have regard to the *dictum* in the judgment of Edgar Joseph Jr J in *Pavone v. PP* [1984] 1 MLJ 77 where it is stated at p. 79:

> Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a Judge sitting alone or with Assessors, calling for the defence upon *prima facie* evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt.

Another point of law of equal importance that requires careful consideration before I proceed to evaluate the evidence in the present case relates to the essential elements that need to be proved by the prosecution beyond any reasonable doubt in order to sustain the offence with which the accused was charged. It is clear that notwithstanding the definition of "trafficking" under s. 2 of the Dangerous Drugs Act which is extensive and includes a very wide range of transactions which could be taken into account in determining the offence of trafficking nevertheless every one of the transactions must necessarily involve the factual elements of possession and knowledge of the dangerous drugs on the part of the person who carried out any one or more of the transactions before he can be convicted for trafficking as defined in the said Act. It is therefore incumbent upon me in the present case to ensure that from the evidence, the prosecution have succeeded in proving beyond any reasonable doubt that the accused had the requisite possession and knowledge of the dangerous drugs in question at the material time and place before they can succeed in getting this Court to return a verdict in their favour.

Bearing in mind all the principles of law as discussed earlier in this judgment, I shall now proceed to evaluate the evidence of the defence in the light of the prosecution evidence. At the outset it is important that I should bear in mind that the case for the prosecution is not grounded on the fact that the accused had actual physical custody or control over P2; neither was he at any time seen to have had actual physical custody or control over P2. The prosecution case is also not grounded on the fact that P2 was found in the accused's house or in his room; neither was it found to be at a spot anywhere near to seat No. 36 occupied by the accused in the bus. P2 was in fact found lying in the luggage compartment of a public transport vehicle namely the bus. There is absolutely no evidence to show that the accused had even touched or seen to have touched P2 until he was asked to unlock it at the narcotics room.

The case for the prosecution turns on the mere facts that (i) the accused was the only person from the bus who was seen not to be in possession of any luggage, (ii) the only piece of luggage left unclaimed in the luggage compartment was P2 and (iii) the accused was in possession of a key which could unlock P2. In effect therefore the prosecution rests its case on nothing more than imputing to the accused the custody or control over P2 by the accused simply because he had a key which could unlock P2. Following the principles laid down in the case of *Haw Tua Tau* (*supra*) such an imputation was tolerably enough to warrant my calling upon the accused to enter on his defence for the reasons as stated earlier in this judgment. However that may be, when this Court is enjoined to evaluate the totality of the evidence at the end of and on the close of the whole case before it can arrive at a proper verdict this imputation by itself and nothing more is not sufficient, as can be seen presently, to hold that the prosecution have discharged the burden of proving beyond reasonable doubt the requisite possession of the dangerous drugs in question by the accused or the accused had the requisite knowledge of them notwithstanding the invocation of the presumption under s. 37(d) and (da) of the Dangerous Drugs Act 1952 (Revised 1980). In this respect, I must also mention that since the words "custody", "control" and "possession" as used in s. 37(d) of the Dangerous Drugs Act are not defined in the said Act, I shall have to fall back on the common law definitions of these words and I find that the authorities preponderantly manifest that there is a clear distinction between possession and custody or control. This concept has been dealt with at length and set out with great clarity by Gunn Chit Tuan J in *PP v. Ang Boon Foo* [1981] 1 MLJ 40 pp. 42-43. It is not necessary to reproduce *in extenso* the judgment of His Lordship; suffice for me to extract two passages from His Lordship's judgment to illustrate this concept. The first passage appears at p. 42H:

> His Lordship later observed in his said judgment that the distinction between custody and possession was as follows:
>
> > The main distinction between custody and possession is that a custodian has not the *power of disposal* (italics supplied). The statement that `possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.
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> The ingredients necessary to make possession criminal were also discussed by Thomson J in the case of *Chan Pean Leon v. Public Prosecutor* in the following words:
>
> > Of course there can be no possession without knowledge and there can be no possession with some *power of disposal* (italics supplied) but an essential ingredient of all possession is that there must be an intention as owner in case of need to exercise that power to the exclusion of other persons.

The second passage which appears at p. 43H states:

> In those particular circumstances I therefore found as a fact in this case that although the accused had custody or control over the packages concerned at the time the police officers raided his house, he did not have the power of disposal over the said packages in the sense of being able to deal with them in the circumstances as owner to the exclusion of all others including the said two Europeans. Or in other words, to apply the observations made by Thomson J (as he then was) in the said case of *Chan Pean Leon v. Public Prosecutor* there was no *animus possidendi* that is, the intention as a matter of fact of dealing with the packages as they belonged to him should he see any occasion to do so.

A further illustration of this concept can also be found in the judgment of Peh Swee Chin J in the case of *PP v. Tan Seow Chuan* [1985] 1 MLJ 318 at p. 325 where it is stated,

> Assuming that I am wrong, and consequently the presumption of possession and of knowledge of the nature of the said opium possessed have thus arisen against the accused, it still behoves the prosecution to prove that the accused had power of disposal over the opium. For possession to be criminal or to sustain a conviction, the prosecution must prove also that the accused had the power of disposal over the thing possessed, i.e. the said opium.

The important principle of law that emerges from these two authorities is that a mere possession of an article is one thing and the possession of an article with *mens rea* is another. Possession which incriminates in drug trafficking cases must have the following characteristics. The possessor must be aware of his possession of the thing possessed or its whereabouts and he must have the power of disposal of the thing should he see any occasion to do so. It follows therefore in the present case the evidence adduced must be sufficient to prove not mere possession of the dangerous drugs in question by the accused, it must go further to prove directly or by reasonable inference that the said drugs were in his possession with *mens rea.*

Notwithstanding the several assertions made by the accused in his unsworn statement from the dock ("his statement") the crux of his defence really lies in his assertions that he was given a red bag by Omar bin Jusoh and also the key of that bag. He kept his personal belongings in that red bag and took it along with him as well as the key when he boarded the bus to commence his journey from Alor Setar to Kuala Lumpur. Although he did not say in so many words, it is clear from his assertions in his statement that he denied to have had possession or any knowledge of P2 let alone its contents at the material time and place. In evaluating these assertions of the accused I perceive from the evidence of the prosecution that the accused was kept under close custody by the police from the time he was ordered to alight from the bus until he was finally put into the police lockup in the police station. In the circumstances he was never given an opportunity to retrieve his own luggage from the luggage compartment of the bus. I say so because although Omar bin Jusoh who was also put under close custody with the accused was allowed to retrieve his luggage just before he was taken into an office in the police station there is no evidence to show and indeed none of the prosecution witnesses had even mentioned that the accused was given the same opportunity. I therefore find as a fact that the accused was never given an opportunity to look for and retrieve his luggage. From the evidence, it is also crystal clear that no one had even bothered to ask the accused whether he had any luggage. Had a step been taken to allow the accused to look for and retrieve his own luggage and had questions been put to him about his own luggage, his conduct of his answers in response would go a long way to assist this Court in arriving at a proper and correct decision particularly when the omission to take the step and to put across the relevant questions as suggested above creates a serious doubt as to whether the accused had possession or knowledge of P2 let alone its contents since there is nothing whatsoever in P2 apart from the key, P4, that could in any way link the accused with it either in terms of ownership, possession or knowledge. It is also clear from the evidence of the prosecution that apart from the purse, P3, containing the key, P4, and the identity card of the accused, nothing else was found from the bodily search made on the accused. In such a state of affairs the obvious question to ask is: It is natural for a person residing in Alor Setar to embark on a journey to Kuala Lumpur without taking along with him anything except the purse, P3 and his identity card? It is highly incompatible with the normal human behaviour of a reasonable man for the accused to travel to Kuala Lumpur from Alor Setar without having a single cent and without bringing along a single stitch of spare clothing or any toiletery of some sort.

As regards the key, P4, which was kept in the purse, P3, recovered form the bodily search made on the accused, I observed that P3 is a small article. I also observed that there is no evidence to show that the accused had made any attempt to discard P3. If the accused had

knowledge of P2 and its contents and he deliberately kept P4 which he knew was the key of P2, would he not , as submitted by the learned Defence Counsel, discard or at least make an attempt to discard it? It would be an easy matter for him to do so when the bus was stopped by the police in front of the police station or at the latest when the police boarded the bus and started to check the identity cards of the passengers sitting in the seats at the front of the bus. The accused was then sitting alone on seat No. 36 which was at the extreme end of the bus. In such a situation, it would be very easy for him to discard P3 by slipping it underneath the seat in front of him or the seat adjacent to him or even underneath his own seat. I also observe that there was absolutely nothing in P3 to show that he was the owner of P3. To clarify this point, I took upon myself to question PW1 whether the accused took his identity card out from out from P3 when PW1 asked him to produce it. I put this question to PW1 as I noticed that there was a compartment in P3 for the owner to keep his identity card. The answer I got was that the accused did not take it out from one of his pockets. There is therefore that much more reason in the circunstances for him to discard P3 if *mens rea* was present since in doing so no one could ever have found out that P3 was at one time in his possession; it is almost possible to trace P3 back to the accused once ne had discarded it. It could of course be argued that the accused could have removed his identity card earlier and before PW1 approached him. If he was able to do so, he would equally be able to discard the purse after removing his identity card had he wanted to do so.

Putting aside all the assertions made by the accused in his statement for a moment, there is yet another intriguing point in the present case which requires my consideration. This arises from the possession of the KOTA EXPRESS bus ticket, P7, which was kept in P3. The seat number written on P7 was "34" indicating that the holder of P7 was required to occupy that seat in the bus. But PW1 in his evidence clearly said that when he approached the rear of the bus to check the identity card of the accused he found the accused seated alone at seat No. 36. This evidence taken by itself might not be of any significance but when it is considered along with the evidence adduced in this case and the surrounding circumstances it is supportive of the reasonable probability that the accused was not in possession of the dangerous drugs in question and he had no knowledge whatsoever of the said drugs since P3 with the key P4 kept therein did not belong to him but to the occupant of seat No. 34 and the accused was keeping P3 for and on behalf of that occupant who quite probably did not tell him that the key P4 was the key of P2 which contained the dangerous drugs in question. Even had that occupant told the accused about P2 and the dangerous drugs concealed therein all that had been proved was that the accused knew of the concelment. But it is clear that knowledge of concealment by itself is not in the circumstances of this case enough to fasten possession on the accused in the absence of any evidence to show that the accused had the power of disposal of the said dangerous drugs which is an essential element to establish possession with *mens rea* within the principle laid down in the judgment in the case of *Ang Boon Foo (supra).* In the course of my consideration of this matter, I am fully aware that it is not unreasonable to presume that the accused could have changed seats since the only bus ticket recovered from him was P7. But as I have stated above, it is an equally reasonable probability that the occupant of seat No. 34 could have handed P3 and its contents to the accused and consequently the question of his changing seats would not arise. As regard to the not-discovery of any other bus ticket except P7 from the bodily search of the accused the question is: How thorough was the search? In this respect I take note of the fact that a bus ticket like P7 is a minute thing and if is folded the chances of its discovery obviously require a thorough bodily search. In the present case it cannot be denied, as can be seen later in this judgment, that PW1 had in mind that a person by the

name of Johari bin Abdul Kadir was a was a participant of the drug trafficking transaction even before he stopped and boarded the bus in front of the police station. Taking into consideration the natural behaviour of human beings it is quite probable that upon discovery of P3 and its contents, the mind of PW1 was fully pre-occupied with the recovery of the which to him would be the evidence to sustain a charge of trafficking in dangerous drugs against the accused. With such a frame of mind it is reasonably probable that he did not think of any need to make a further search. In the result, the original ticket of the accused for seat No. 36 could have been overlooked. Another inference that can be drawn is that it is not unreasonable to consider the probability that the accused could have misplaced his own ticket. However that may be as there is more than one reasonable inference that can be drawn from this set of facts and following the well-settled rule that in such a circumstance, the one inference which is most favourable to the accused must be adopted, it is only proper for me to draw the inference that the accused did not change seats and the original seat allocated to him was seat No. 36. At any rate the more important point is that no evidence was led by the prosecution to explain the contradiction that arises from the occupation of seat No. 36 by the accused when the bus ticket recovered from him, P7, shows a different seat number particularly when P7 was tendered as a prosecution exhibit. This contradiction could have been easily explained had evidence been led to show that the police did make some inquiries regarding this matter. As it is this Court is kept in doubt as to who was the person who occupied seat No. 34 and why was that person not brought in for questioning by the police. In this respect it is to be noted that PW1 in his evidence said that Omar bin Isa was seated at seat No. 30 when he was not even questioned as to the seat occupied by the said Omar bin Isa. Would it not be probable that seat No. 34 was occupied by Omar bin Jusoh and that P3 with the key, P4, kept therein was handed over to the accused by the said Omar bin Jusoh? It is obviously not for the Court to find an answer to any of these questions in the absence of supportive evidence. Be that as it may, as a result of the contradiction there is sufficient reason for me to hold that the accused has cast doubt in the case for the prosecution and I do so hold.

In the consequence of my findings as stated in the preceding paragraphs and applying the principle as laid down in the *Yuvaraj* case (*supra*) I hold as a fact that P4 is the key of the red bag in which the accused kept his personal belongings and that he was not in possession and had no knowledge of P2 let alone the dangerous drugs in question concealed therein at the time and place mentioned in the charge. In arriving at my conclusion I am not unmindful of the fact that P4 could unlock P2; nevertheless that fact by itself without more is inadequate to cause me to alter my conclusion. Besides there is the unchallenged evidence of DW1 who said that P4 was a standard key and could unlock any built-in lock similar to the one in P2. The demonstration carried out by DW1 at the trial proves his point. I am far from saying that the demonstration taken by itself is sufficient to instigate me to arrive at my conclusion - it is the cumulative effect of all the matters postulated earlier in this judgment that really caused me to arrive at my conclusion. In any case even if I am not convinced of the truth of the assertions made by the accused in his statement, nevertheless I am satisfied that the accused has raised some serious doubts as to the truth of the case for the prosecution. The upshot of my findings is that the accused has succeeded in rebutting the presumption under s. 37(d) and (da) of the Dangerous Drugs Act 1952. In the result the onus of proving the elements of the accused having possession and knowledge of the dangerous drugs in question which is essential to sustain the offence with which the accused is charged continues to rest on the prosecution.

I must, however, mention that the learned DPP objected to the accused resorting to the issue of his possession of the red bag as part of his defence. He contended, if I understand him correctly, that since the learned defence Counsel had at no time during the presentation of the case for the prosecution by the learned DPP and in his cross-examination of the prosecution witnesses touched on this issue, the prosecution were therefore caught by surprise by the accused bringing in this issue suddenly and unexpectedly. The learned DPP then applied to this Court to call a fresh witness to refute the assertion of the accused regarding his possession of the red bag. I rejected the application of the learned DPP and my reasons for doing so will be given presently in this judgment. Suffice for me to say here that with respect, the contention of the learned DPP is devoid of any merit because I am of the view that the learned defence Counsel had given sufficient indication albeit indirectly in his cross-examination of PW1 that the issue of the accused being in possession of the red bag at the time and place mentioned in the charge would be part of the defence. It is useful to reproduce from the notes of evidence the trend of the learned defence Counsel's cross-examination of PW1 on this point:

Defence Counsel puts	:	There were two bags left in the luggage compartment not identi fied. One brief case and the other is a red bag?
Answer	:	No, only ID2.
Defence Counsel puts	:	When accused was brought down from the bus, you took both the red bag and ID2 to the police station?
Answer	:	I disagree.
Defence Counsel puts	:	It was in the police station office that you asked who owned the two bags. You questioned Omar Isa, Omar Jusoh and accused who owned the two bags?
Answer	:	No. It was not my men who brought in the two bags. It was the driver who brought in the ID2. I tried to open ID2 but it was locked.

From the trend of the cross-examination of PW1 by the learned defence Counsel, it is clear that he had sufficiently indicated to the prosecution that the red bag mentioned in the questions and answers in the course of the cross-examination would play a part in the defence of the accused. It cannot therefore be said that the accused had suddenly and unexpectedly brought in something new in his defence. In the circumstances the learned DPP should act on the assumption that such defence would be raised and meet it as part of the prosecution case.

Assuming that I am wrong in arriving at my conclusion on the premises as stated in the preceding paragraphs there is still another factor which requires serious consideration on my part. This concerns certain infirmities in the prosecution evidence which in my view fortify the defence case. More importantly these infirmities create an extensive and irreparable gap in the prosecution case and also cause me to question the veracity of the evidence and credit-worthiness of PW1. The infirmities are:

In the first place PW1 in his evidence was absolutely certain that it was PW2, the bus driver who took P2 from the luggage compartment into the narcotics room. He went to the extent of identifying the bus driver, PW2 to this Court. In stating that it was PW2 who carried P2 from the luggage compartment to the narcotics room, PW1 took pains to point out to this Court that the conveyance of P2 was never done by any of his "men" meaning no doubt by any police personnel. Indeed the impression I got from the evidence of PW1 is that no member of the police personnel had even touched P2 whilst it was lying in the luggage compartment

until it was placed on the table in the narcotics room. PW1 then went on to say that after P2 was taken into the narcotics room, he again asked PW2 whether he had seen any of the passengers from the bus carrying P2. Only when PW2 was not able to enlighten him on this point, did he then proceed to make a bodily search on the accused. The evidence of PW2 in the examination-in-chief is not only an outright denial of the suggestion that it was he who carried P2 from the luggage compartment into the narcotics room but he went further to say that he did not even know who the person was who conveyed P2. Besides, PW2 also said in his evidence in the examination-in-chief that he did not go along with PW1 when he took the accused into the narcotics room but that he (PW2) went into the room at a later stage when the police had already started to make a bodily search of the accused. More confusion emerges from the evidence of PW3 regarding the conveyance of P2 to the narcotics room. As an investigating officer, one would expect PW3 to be vigilant and to keep a careful watch over P2 at all material times. But in his evidence he said in the examination-in-chief that he saw PW1, PW2 and the accused went to the luggage compartment, took the bag, P2, and proceeded to the narcotics room. However, when he was cross-examined, he said he could not tell who carried P2 into the narcotics room and that he did not accompany PW1 when the latter took the accused into the said room. The discrepancies in the evidence of the prosecution witnesses regarding the conveyance of P2 from the luggage compartment to the narcotics room create a serious gap in the case for the prosecution. It was the duty of the police to take immediate custody of P2 whilst it was lying in the luggage compartment and to take it to the narcotics room for by that time it should be apparent to the police that P2 would be an important exhibit. If the police relied on a civilian to carry it, it was equally their duty to keep a careful guard over it at all times during its conveyance to the narcotics room. This is to ensure that the chain of evidence relating to the discovery of the essential exhibit and its production to the Court must be complete. In the present case there is no doubt a break in the chain of evidence as there is no sufficiently clear-cut evidence as to who took P2 into the narcotics room and whether P2 was not in fact taken into the narcotics room by someone who was not authorised to do so. This prompts me to ask: Is it not probable that someone who took P2 into the narcotics room could have tampered and did tamper with it? In an attempt to answer this crucial question one must consider the following factors: (i) there is no evidence to show the length of time it took to carry P2 from the luggage compartment to the narcotics room; (ii) the rear compound of the police station according to PW2 was dark; (iii) there were some 26 civilians milling around the police compound and there is no evidence to show that the police had kept a proper check to ensure that no outsiders were allowed in the said compound; and (iv) there was also no proper check regarding the retrieval of the luggage by the passengers of the bus. Taking all these factors into consideration I cannot disregard the probability that some unauthorised person could have taken P2 into the narcotics room and in the course of doing so that person could have tampered with P2 without the knowledge of the police.

In the second place, PW1 was again very certain that he directed PW2 to unlatch the luggage compartment and PW2 did so after he had brought the bus into the police compound behind the police station. He also said that he was not in the bus when it was being driven from the road outside the police station to the police compound - his evidence on this point is clear from his following statement, “I did not follow the bus in the sense that I was not in the bus” - and that he was with the accused and Omar bin Jusoh at the police compound at the relevant time thus suggesting he did see PW2 unlatching the luggage compartment. PW2 while in the examination-in-chief denied that it was PW1 who instructed him to unlatch the luggage compartment, said under cross-examination that it was his assistant, Ramli bin Awang who unlatched the said compartment at the police compound. He went further on to say

that he also saw two or three persons whom he could not recognise taking out the luggage from the said compartment. The situation becomes more enigmatic when PW3 testified in the examination-in-chief that although he could not say what PW1 was really doing in the bus he believed that PW1 was checking the identity cards of the passengers **while the bus was inside the police compound**. Under cross-examination, **he said he did not know who unlatched the said compartment and in any event the said compartment was already "opened".** In view of the inconsistencies and discrepancies in the evidence of the prosecution witnesses, it is obviously necessary for me to sieve their evidence with great care to enable me to arrive at a just decision. First of all I observe that the evidence of PW3 indicates that the luggage compartment was "opened" even before PW1 and the passengers alighted from the bus. Although he was not sure as to what PW1 was doing in the bus, but from the way he testified the impression that he gave was that PW1 was still in the bus checking the identity cards of some passengers or questioning them. This is diametrically at variance with the evidence of PW1 who claimed that he was never in the bus when it was brought in and parked at the compound behind the police station and also that the passengers were directed by him to collect their luggage after they had alighted from the bus. This discrepancy might appear to be innocuous but when one superimposes this discrepancy upon the evidence of PW2 when he said that he saw two or three persons whom he could not recognise removing the luggages when the luggage compartment was opened by Ramli bin Awang thereby clearly suggesting that the removal of the luggage by these persons was carried out even before PW1 and the passengers had alighted from the bus and before PW1 had directed the passengers to retrieve their luggage, the seriousness of the discrepancy is apparent and the inevitable question that must follow is whether these two or three persons had any business or authority to remove the luggage at that time. It is obviously crucial to get an answer to this question. In the absence of an answer this Court is placed in a position of doubt as to whether these two or three persons were not in fact tampering with the luggage even before PW1 and the passengers got down from the bus and in the course of doing so the red bag of the accused in which he kept his personal belongings could have been removed by one of these persons who also could have tampered with P2 whilst it was in the said compartment.

In the third place, while PW1 said in his evidence that the only person who had no luggage was the accused PW2 however said that he himself and his assistant, Ramli bin Awang, were also not in possession of any bags. In his explanation, PW2 said that he kept his luggage in the floorboard of the bus near the driver's seat and that his assistant, Ramli bin Awang, did not have any bag in the luggage compartment. But the important point is this: both PW1 and PW3, the police witnesses, did not even bother to check the luggage of PW2 and there is no evidence to show whether Ramli bin Awang had any luggage at all. Had proper investigations been carried out particularly as regards to the luggage of Ramli bin Awang the outcome of the investigations might go a long way to assist this Court to determine as to who was the owner or possessor of P2. As it is this Court is left with a doubt as to

(i) whether the said Ramli also was not in possession of any luggage at the material time; and

(ii) whether there might not be something in his luggage, if he had one, that could connect him with P2 and its contents in terms of ownership or possession. It is very well for PW2 to say that Ramli bin Awang did not keep any of his luggage in the luggage compartment. But that by itself is not sufficient to dismiss the vacuum that has been created because one wonders how on earth could he be certain that the said Ramli did not keep any of his luggage in the luggage compartment considering that he offered

no explanation as to how he came by such knowledge. Besides, I do not think I am far from wrong in saying that PW2 is certainly in no position to know about the contents of the luggage of the said Ramli unless he had checked the said luggage before it was taken on board the bus which obviously is quite unthinkable. In the result, it is not unfair to say that the gap in the prosecution's case has turned into a chasm.

These infirmities involve matters that are crucial and which must be accounted for before this Court can arrive at a just decision. As things stand, this Court is left with more questions than answers. These disturbing infirmities in the evidence of the prosecution could have easily been ironed out had Ramli bin Awang been called as witness for the prosecution. Had Ramli bin Awang been called as a witness for the prosecution he might be able to enlighten this Court as to who unlatched the luggage compartment and who were the two or three persons who were seen by PW2 to be removing the luggages soon after the luggage compartment was opened. He could even tell this Court who was the person who carried P2 from the luggage compartment to the narcotics room. In failing to do so and notwithstanding that the prosecution had made him available to the accused to call him as a witness for the defence, I am justified to invoke, which I do, the presumption under s. 114(g) of the Evidence Act 1950 (Act 56) to draw an adverse inference against the prosecution following the ruling of the Supreme Court in *Abdullah Zawawi v. PP* [1985] CLJ (Rep) 19 at p. 23:

> If the doubt consists of a gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

In view of the several discrepancies between the evidence of PW1 and the evidence of PW2 and PW3, as stated earlier in this judgment, I must invariably question the veracity of PW1's evidence and his credit-worthiness. In doing so, I am fully aware of the general rule which says that one should accept the evidence of police witnesses unless their statement in evidence is so incredible as akin to a passage taken from the nursery rhyme of the "cow jumping over the moon". This general rule, like any other general rule, is certainly not absolute and subject to the exception that if any part of the evidence of a police witness is contradicted, there is no room for the application of the general rule. A good illustration of this proposition can be found in the judgment of Syed Othman J (as he then was) in *Tua Kin Ling v. PP* [1970] 2 MLJ 61 where His Lordship disapproved the acceptance of the evidence of a police witness who was a Chief Inspector wholesale when parts of the evidence of the witness were shown to be inconsistent of the truth. A sensible way of dealing with the evidence of a witness who demonstrably tells lies on one or two points in exemplified in the judgment of Thomson CJ in the oft-cited of *Khoon Chye Hin v. PP* [1961] 1 MLJ 105 where his Lordship after suggesting that such a witness was clearly not a reliable witness went on to say at p. 107:

> ... and in the matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion.

Applying the principles advocated by the two authorities cited above to the present case, I therefore cannot accept that part of the evidence of PW1 regarding the collecting of P2 from the luggage compartment by PW2 and that he carried it along with PW1 and the accused to the narcotics room. The rejection of this piece of evidence of PW1 goes to support that the conveyance of P2 from the luggage compartment into the narcotics room was done in a manner which must cause one to doubt whether P2 was not in fact tampered with in the course of its conveyance to that room. I also cannot accept the impression which he tried to give in his evidence that PW2 and PW3 were all along with him when he took the accused into the narcotics room. In the consequence, the Court is left with the assertion of the accused

when he said he saw his reg bag in the narcotics room when he was brought into the room. In considering this assertion I did take into consideration that there is no evidence to show the length of the interval when PW2 and PW3 went into the narcotics room after PW1 had taken the accused into the room, thereby causing me to doubt whether it might not be true that in the absence of PW2 and PW3 the accused did see what he said he saw.

In the consequence of these uncertainties I have every reason to hold that there is some serious doubts as to the truth of the case for the prosecution. In fairness to PW1 I must say that I do not think that he was deliberately trying to mislead this Court. His fault lies in his strong belief that the accused was a participant in the drug trafficking even before he boarded the bus. This is supported by his answer to question put to him by the learned defence Counsel in which he said that he "was looking for a name of a passenger" when he boarded the bus and also from that fact that as soon as he discovered the accused was known as Johari bin Abdul Kadir he straightaway took him into custody. Because of his belief in the guilt of the accused he had inadvertently failed to carry out a thorough investigation of the case. It may be useful for him to take note of the adage which says that "if a man will begin with certainties he shall end in doubt; but if he will content to begin with doubts he shall end with certainties".

Accordingly I am satisfied that the accused has succeeded in rebutting the presumption under s. 37(d) of the Dangerous Drugs Act 1952 (Revised 1980) and it behoves the prosecution to prove beyond a reasonable doubt the essential elements of the offence with which he was charged namely that at the material time the accused had in his possession and also had the necessary knowledge of the dangerous drugs in question. That the prosecution had failed to do within the ambit of the concept as laid down in the case of *Tan Shu En & Anor. v. PP* where it is stated at p. 202:

> A line of local cases culminating in *R. v. Liew How Yeong*, has established that, in order to prove "possession" of opium or similar forbidden articles, it must be established affirmatively:
>
> (a) That the accused had actual or potential physical control thereof: **and**
> (b) that he had the intention to exercise such control. [Emphasis supplied]

In *DPP v. Brooks* [1974] AC 862 equal emphasis of the knowledge and intention to exercise control as a prerequisite of possession was acknowledged by the Privy Council. Furthermore the evidence of the prosecution falls short in establishing that the accused had the right of disposal of the dangerous drugs in question as judicially suggested in the *Ang Boon Foo* case (*supra*). In any event I am also satisfied that as a result of the extensive and irreparable gap in the prosecution case, they have also failed to discharge the onus of proof beyond any reasonable doubt of the guilt of the accused.

Before I conclude I must also mention that at the end of the case for the defence, the learned DPP made an application to me to call the said Omar bin Jusoh as a witness for the prosecution to rebut the statement made from the dock by the accused. His application was said to be made under s. 425 of the Criminal Procedure Code. It is to be noted that under that section the discretion lies with the Court whether to call any additional witness or to recall and re-examine any person already examined provided the evidence from such witness or such person appears to the Court essential to the just decision of the case. By its very nature, the discretion to be exercised by the Court under s. 425 depends on the facts of each case, the main consideration being the essentiality of the additional evidence to a just decision of the case. Reference may be made to *Ramli bin Kechik v. PP* [1986] CLJ (Rep) 243 at p. 247. It has also been stated that where the Court exercises the power under the second part, the debate is not over the issue that the accused has brought anything suddenly

or unexpectedly but rather whether the Court is right in thinking that the new evidence is needed by it to arrive at a just decision of the case. If the Court has acted without the requirement of a just decision, the action is open to criticism. (see *Jamatraj v. State of Maharashtra* [1968] AIR SC 178). Applying the principles emerging from the two authorities stated above I am of the view that in the instant case the evidence of Omar bin Jusoh is not necessary to enable me to arrive at a just decision because firstly the accused had made a statement from the dock and it is for me to consider the weight to be given to his statement in the light of the totality of the evidence. Secondly and more importantly, the said Omar bin Jusoh was also arrested at the same place and time for suspected drug trafficking. He was at the date of trial still under detention. He might or might not be an accomplice but he certainly is a person of unsavoury character and considering that at the time of the trial he was still under police detention and the police were still carrying investigation into his involvement of a drug trafficking case, his integrity and credit-worthiness would certainly be questionable and his evidence could not carry very much weight. In the consequence, I am of the view that the calling of the said Omar would not assist this Court in arriving at a just decision. On the contrary in taking such a step it would only go to show that the Court would be favouring one party as against the other. I therefore disallowed the learned DPP's applciation as I am of the view that whatever evidence that could be given by the said Omar could not be of much assistance to this Court in arriving at a just decision.

Upon a final analysis of the totality of the evidence and the circumstances of this case I am satisfied that the accused is not guilty of the offence with which he is charged and I do find accordingly. I hereby order that the accused be acquitted and discharged.

APPENDIX

On the third day of hearing before the close of the case for the prosecution I indicated that I should make a ruling as regards to the admissibility of certain statement said to have been made by the accused to PW1 before continuing with the case. The statement made by the accused showed that the black bag P2 was his. However the learned DPP and the learned Counsel for the accused indicated that I could make my ruling after the close of the case for the prosecution and after hearing the submissions from the learned DPP and the learned Counsel for the defence. Now that the prosecution has closed its case and Counsel have made their submissions I shall therefore make a ruling on this issue before I proceed any further.

The definition of arrest is broadly described in s. 15 of the Criminal Procedure Code which reads as follows:

> 15. Arrest, how made
>
> (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resist the endeavour to arrest him or attempt to evade the arrest such officer or other person may use all means necessary to effect the arrest.

It is clear from the wordings of sub-section (1) and (2) of s. 15 of the Criminal Procedure Code that in making an arrest the arresting officer can either state that he is arresting the individual and thereupon proceeding to touch him or confine the person; alternatively an arrest may occur when the arresting officer has to use force to restrain the individual concerned. Apart from these two alternatives, arrest can also occur when by words or conduct

the arresting officer makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. The various ways of effecting an arrest are clearly indicated by the Privy Council in the case of *Shaaban & Ors. v. Chong Fook Kam & Ors.* [1969] 2 MLJ 219.

Turning to the evidence of the prosecution in the present case, it is clear that the police received information about a case of drug trafficking. They stopped the bus, P8, as a consequence of the information. Hence investigations had started and any statement made by an accused could not be made admissible but for s. 113 of the Criminal Procedure Code or the similar provisions in the Dangerous Drugs Act under s. 37A thereof. It is also clear from the evidence that from the time when the accused was taken off the bus he was under guard by the police until he was taken to the narcotics room. In the narcotics room there were 2 inspectors i.e. PW1 and PW2, and 2 detective constables guarding him in that room. Furthermore a bodily search was carried out on him by PW1. Upon recovery of the key (P4), as a consequence of the bodily search, the accused was told to unlock the bag (P2). After he had unlocked the bag, PW1 then opened the bag and thereupon PW1 asked the accused a question and the accused was said to have made the impugned statement in answer to that question.

It is clear therefore at the time when the accused unlocked the bag if not earlier he was already under arrest. I say so because by the time the liberty of the accused to move freely had been curtailed and that PW1 by his conduct clearly showed that he would if necessary use force to restrain the accused from moving freely. In the circumstances I therefore hold that the accused was under arrest before the question was put to him by PW1 and no caution was administered to him to elicit the answer. The statement that he made in answer to that question is clearly inadmissible in view of the proviso (b) of s. 37 of the Dangerous Drugs Act 1952 (Revised 1980). To fortify my finding reference may be made to s. 20 of the Criminal Procedure Code. It is clear from the language of that section that under the circumstances specified therein a police officer may make a bodily search of a suspect when he puts the suspect under arrest. An equivalent provision can be found in s. 31(2) of the Dangerous Drugs Act 1952 where it is said:

> Every person so arrested may be searched at any convenient place.

From the wordings of this section it cannot be disputed that a bodily search of the accused in the circumstances of this case was carried out after the accused was placed under arrest. Reference may also be made to the case of *PP v. Tan Seow Chuan* [1985] 1 MLJ 319. In that case Peh Swee Chin J said that the accused there was under arrest as soon as the arresting officer showed his authority card to the accused who told him his name on being so asked by the arresting officer. It may be useful for me to quote the following passage from the judgment of Peh Swee Chin J appearing at p. 323:

> Although there was no such popular and usual signs of handcuffs or words of arrest, nonetheless there would be no doubt, that his personal liberty was from that moment restrained, therefore he was under arrest from that moment, and such restraint of personal liberty can be implied from surrounding circumstances.

Likewise in the present case it is clear that from the surrounding circumstances the accused's liberty had been completely curtailed when he was asked to unlock the bag. I therefore hold that the statement said to be made by the accused in answer to the question by PW1 is not admissible and I accordingly expunge that statement from my record.

Also found at [1987] 2 CLJ 66